SUPREME COURT OF THE UNITED STATES.

No. 24—October Term, 1926.

Doras Hebert, et al., Plaintifis in Error, vs. State of Louisiana	In Error to the Supreme Court of the State of Louisiana

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

With leave of this Honorable court, comes plaintiffs in error Doras Hebert, et al, in the above entitled and numbered cause, through undersigned counsel, and respectfully show to the court that they are aggrieved because of the decision rendered in said cause by this Honorable Court, through Mr. Justice Van Devanter, on November 1, 1926, and now respectfully moves this court to grant a rehearing of said cause on the ground and for the reasons following, towit:

ASSIGNMENT OF ERROR NO. 1.

This honorable court erred in affirming the judgment of the Supreme Court of Louisiana, because said court did not have jurisdiction of the person of the accused, because they were in the custody of the Federal Court under bond to answer for the same offense, which court was first seized of jurisdiction

and had not waived or exhausted its jurisdiction, and for the reason under the charge lodged against the accused in the Federal Court they were entitled to a trial by jury and denied the right of a trial by a jury under the State Law; and, further, because said State Court had no jurisdiction of the subject matter or offense with which they were charged, because of the provisions of Section 256 of the Federal Judicial Code, purporting to vest exclusive jurisdiction in the Federal Court over the offense charged.

ASSIGNMENT OF ERROR NO. 2.

This Honorable Court further erred in its opinion on page 3, holding that if the United States did not intercede the accused could not be heard to complain, because if the Federal Government did have a right to intercede to maintain its jurisdiction the accused would have the same right unless the United States abandoned the prosecution and voluntarily surrendered the plaintiffs in error for trial to the State Courts; and this Honorable Court erred in assuming that the Federal Court did acquiesce and surrender its jurisdiction (as a matter of fact it did not,) and as long as the accused did timely complain, a denial of such right would be denying them the uniform and equal protection of the law under the Constitutional provisions relating thereto, or, in other words, if the United States had a right to intercede then the same right is vested in the individual citizen.

ASSIGNMENT OF ERROR NO. 3.

The court further erred in holding that Section 256 of the Federal Judicial Code could apply only to offenses against the Federal Government and cognizable under the authority of the United States, because the same is an act of Congress preserving to the Federal Courts the **exclusive jurisdiction** over such offenses as are recognized as a crime or an offense against the United States, and is a specific selection of such offenses over which the Federal Government shall have **exclusive jurisdiction** and the jurisdiction of the several states shall be excluded, and if it applied only as interpreted it would be idle and useless, because the United States would need no such special provision as the supreme law of the land unless it was the intention to declare that where any conflict of authority arose between the Federal Government and any State the United States should have **exclusive jurisdiction** over the subject matter involved if cognizable under its authority.

ASSIGNMENT OF ERROR NO. 4.

The Honorable Supreme Court of the United States further erred in so holding because the Federal Law is the Supreme Law of the Land, so designated under the Constitution and Laws of the United States, because Congress has the power to enact laws restricting the several states in their legislation on certain subject matters cognizable under the authority of the United States, and to prohibit dual prose-

cution for the same offense, otherwise under certain cases a man could be hung twice for the same offense, and said decree therefore nullifies the provisions of the Constitution as urged by plaintiffs in error and particularly so under the XVIII Ammendment since Section 2 thereof provides that Congress and the several States shall have concurrent **power** to enforce said ammendment and does not provide that the two independent sovereignities shall have "separate" **power** so to do; and because said decree destroys the comity existing between courts well established and existing from time immemorial, and likewise overrides the common custom of the Republic, because heretofore the paying of a penalty in one court of competent jurisdiction has generally been recognized and the contrary principle has only become pronounced in the enforcement of prohibition since the XVIII Ammendment and made applicable principally to violations of liquor laws only.

ASSIGNMENT OF ERROR NO. 5.

This Honorable Court further erred in holding that the State and Federal Governments are two separate and independent sovereignities under the XVIII Ammendment, because said ammendment is not self-operative and since the Federal Government enacted legislation carrying said ammendment into effect the State legislature can not enact legislation on the liquor subject in the exercise of its independent dominion, unless such legislation is in aid of prohibition and restricts its independence to such limit, thus denying unto the several states the right

of self-government and the power to act on or legislate on the subject independently and as a free agent.

ASSIGNMENT OF ERROR NO. 6.

This Honorable Court further erred in decreeing that no Constitutional rights, privileges or immunities of plaintiffs in error have been violated, because such a decision is in conflict with Constitutional provisions under both the Federal and the State Constitutions relating to double jeopardy and dual prosecution for the same offense and can only have the effect of causing the repeal of the State Laws in aid of prohibition and the enforcement of the XVIII Ammendment, since any other legal remedy is denied.

ASSIGNMENT OF ERROR NO. 7.

This Honorable Court further erred in its ruling holding that plaintiffs in error were not deprived of their liberty and property without due process of law, because a trial by jury was guaranteed accused in the Federal Court and was denied the accused in the State Court, and an excessive and illegal sentence imposed beyond the power of the court to impose, and because the accused were denied the right to contest the validity of the search warrant used by Federal Agents in searching the private dwellings of the accused.

ASSIGNMENT OF ERROR NO. 8.

This Honorable Court further erred in its ruling on page 4 of said decree in holding that the plaintiffs in error had not urged the lack of power on the

part of the State to impose the excessive and illegal sentences complained of, because it was the intention of the plaintiffs in error to urge the want of power on the part of the State of Louisiana to impose a sentence beyond the terms and provisions of the special statute, and urged the want of due process of law and lack of power before this Honorable Court, and if the principle announced in the decree is sustained a State court could imprison a citizen of the United States without any warrant of law whatsoever and such citizen would be denied any remedy or relief, except perhaps by writ of Habeas corpus after serving the portion of the sentence that might be imposed in accordance with the statute, if not held res adjudicata.

ASSIGNMENT OF ERROR NO. 9.

The decree of this Honorable Court is further erroneous in that said decree is conflicting in its scope because the XVIII Ammendment is held not the source of power for the enactment of legislation by the several states against sale and manufacture of intoxicating liquors, yet at the same time holding that the State is an independent sovereignity and does not derive right or power from the XVIII Ammendment, but implies that the XVIII Ammendment may be ignored insofar as legislation on the part of the several states is concerned, yet restricting them and their independent sovereignity merely to legislation in favor of prohibition and denying their right to enact legislation against prohibition or authorizing the manufacture of intoxicating

liquors, and therefore said opinion is conflicting and inconsistent with the principle of self-government, because in one instance it restricts the independence of the State and in the other it treats the State as an independent government with the right to enact legislation irrespective of the Constitution of the United States, on the subject of prohibition, which amounts to **class legislation** through judicial interpretation.

WHEREFORE, plaintiffs in error respectfully pray that this motion for rehearing be allowed and filed; that said cause be reconsidered by this Honorable Court and a rehearing granted, setting aside the decree rendered herein on November 1st, 1926, and annulling the decree of the Honorable Supreme Court of the State of Louisiana, granting unto plaintiffs in error the relief originally prayed for and ordering that they be discharged without day and their bonds cancelled.

For all orders and decrees necessary in the premises, full, general and equitable relief, and such special relief as they may be entitled to under the Constitution and Laws of the United States of America.

Respectfully submitted:

Lake Charles, Louisiana,
December 3, 1926.

A. P. Mikell
Attorney for Plaintiffs In Error.

Alex Britton Edwards
Of Counsel.

Office Supreme Court, U. S.
FILED
OCT 1 1926
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 24.

DORAS HEBERT, ALCEE BENOIT, JOHN MILLER, AND CLOBULE ABADIE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA, DEFENDANT IN ERROR.

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IN THE

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No. 24.

DORAS HEBERT, ALCEE BENOIT, JOHN MILLER, AND CLOBULE ABADIE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA, DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

Plaintiffs in error rely upon the following assigned errors:

Point 1. That the Honorable Supreme Court of Louisiana erred in refusing to maintain the plea to the jurisdiction of the State District Court, for the reason that defendants had been indicted and placed under bond in the United States District Court for the West-

ern District of Louisiana, charged with a violation of the Eighteenth Amendment to the Constitution of the United States, and the National Prohibition act, for offenses growing out of identical acts, for which they were prosecuted in the State District Court under Act 39 of the Legislature of Louisiana for the year 1921. Plaintiffs in error take the novel and seemingly ingenious position that under Section 256 of the Federal Judicial Code the State courts are powerless to prosecute violations of its laws or offenses against its sovereignty as defined by State statutes.

Point 2. That the Honorable Supreme Court of Louisiana further erred in holding that the sentence imposed was legal and valid under Act 39 of the Louisiana Legislature of the year 1921, and particularly Section 3 of said act, reading:

> "That any person who shall violate the provisions of this act by manufacturing, or having in possession for sale, or by selling intoxicating liquors shall be guilty of a misdemeanor, and upon conviction for the first offense, shall be fined not more than five hundred dollars, and be imprisoned not less than ten days nor more than sixty days,"

because the statute limits both the fine and imprisonment "for the first offense," and for the reason that the remainder of said Section 3 of Act 39 of the Louisiana Legislature of 1921 reads:

> "And for the second or subsequent offense, shall be fined not less than one hundred dollars ($100.00), nor more than one thousand dollars

> ($1,000.00), and be imprisoned not less than thirty days nor more than twelve months; and any person who shall otherwise violate the provisions of this act shall, upon conviction, be fined as herein above provided, or, may be imprisoned not exceeding the maximum limits herein above provided, or may be both fined and imprisoned, at the discretion of the court,''

because the first portion of said statute quoted actually, in plain language, limits the powers of the trial court as to the sentence to be imposed for the first offense, which enables the court to impose a maximum fine of not more than $500 and a jail sentence of not less than ten days nor more than sixty days, which positively fixed both a minimum and maximum sentence, with the discretion of the trial court to impose the limit provided, and does not authorize any other sentence for the first offense, and specially provides a latitude to the trial court to impose an alternative sentence in the parish jail for not less than ten days nor more than sixty days in default of the payment of any fine imposed not exceeding $500; and this statute specially repeals Section 980 of the Revised Statutes of Louisiana on this subject-matter, and any resort to said statute in an attempt to impose a fine exceeding $500 or in default of payment, by imprisonment beyond sixty days, is a violation of the Federal and State constitutional rights and privileges of defendants, and particularly under the provisions of said constitutions above quoted, in that said decree of April 11, 1924, deprives the defendants of the equal protection of the

laws and of their property and liberty without due process of law; therefore relators have been illegally convicted. And because the subsequent part of said Section 3 of Act 39 of Louisiana Legislature last quoted specially provides an increased penalty over that provided in the first part quoted "for a second or subsequent offense," providing fine of not less than $100, nor more than twelve months, and makes a special provision for any other violations of this law for first and second offenses.

Point 3. That the Honorable Supreme Court of Louisiana further erred in its decree in this matter in holding that the Revised Statutes of Louisiana, Section 980, reading:

> "Every person being adjudged to pay a fine, shall, in default of payment or recovery thereof, be sentenced to be imprisoned for a period not exceeding one year,"

should govern and control in sentencing a defendant because such decree is judicial legislation and an encroachment by the judiciary upon the legislative branch of the State government, in violation of article 11, and subsections 1 and 11 of the Louisiana Constitution for the year 1921, for the reason that said decree reads into said special statute, Act No. 39 of 1921, Section 980 of the Revised Statutes, and fails to uphold the plain provisions and legislative will set out in said Act 39 of 1921, because if said Act 39 of 1921 is not specific and definite in its terms, then said whole stat-

ute is unconstitutional, null and void for failure to provide for the imposition of any penalty whatever for its violations, and in such a case, this Honorable Court cannot, by judicial interpretation, bring to its aid, in order to maintain its effectiveness, Revised Statutes of Louisiana, Section 980, because each section and provision of said Act 39 of Louisiana Legislature for the year 1921 is so interwoven that any part thereof which proves ineffective necessarily strikes the whole statute with nullity, and therefore said decree imposes an illegal, null and void sentence upon your defendants, and deprives them of their liberty and property without due process of law.

Plaintiffs in error have assigned a fourth point, which, however, has not been pressed in their brief, and, therefore, under uniformly accepted rules of practice, must be taken as abandoned.

Reply of the State of Louisiana, Defendant in Error, to the First Point Relied upon by Plaintiffs in Error.

The first point relied upon by plaintiffs in error is that under article 256 of the Federal Judicial Code, reading as follows:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States:
>
> "1. All crimes and offenses cognizable under the authority of the United States,"

plaintiffs in error were prosecuted for alleged violations of Act 39 of the Legislature of the State of Louisiana for the year 1921, commonly referred to as the Hood Act, and not for any crime defined by a Federal statute. We respectfully submit that it is elementary that the Federal and State sovereignties are separate and independent; that a prosecution under a State law is a prosecution by a different sovereignty from that of the Federal Government, enforcing the Volstead Act, and therefore conviction under one is no bar to a prosecution under the other, as this Honorable Supreme Court of the United States has definitely held in the following very recent case, wherein this Court said:

> "The amendment (Eighteenth) was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State. They may vary in many particulars, including the penalties prescribed, but this

is an inseparable incident of independent legislative action in distinct jurisdictions.

"To regard the amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, State power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior State laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment but from power originally belonging to the States, preserved to them, by the Tenth Amendment, and now relieved from the restriction hereto arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in Vigliotti *v.* Pennsylvania, 258 U. S., 403; 42 S. Ct., 330; 66 L. Ed., —.

"We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the

same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

"It follows that an act denounced as a crime by both National and State sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to the proceedings by the Federal Government (Barron *v.* City of Baltimore, 7 Pet., 243; 8 L. Ed., 672), and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against the State is not a conviction of the different offense against the United States, and so is not double jeopardy." Citing U. S. *vs.* Lanza, 260 U. S., 377; 43 S. Ct., 141, reversing U. S. *vs.* Peterson, 268 Fed., 864.

Counsel for plaintiffs in error in the brief which has been filed with this Honorable Court seeks to distinguish the principles laid down in the Lanza case from

that involved in the determination of the instant point by differentiating the facts presented in the Lanza case from the facts presented under the point now being discussed.

The pertinent facts in the Lanza case were that the State court was first seized with jurisdiction, and the District Court of the United States maintained a plea to the jurisdiction, based upon double jeopardy, whereas, in the present case, the plaintiffs in error had been previously charged in the District Court of the United States with violations of the National Prohibition Act, and were awaiting trial thereon. Subsequently to having been charged in the United States District Court aforesaid, plaintiffs in error were prosecuted under the Hood Act (Act 39 of the Legislature of Louisiana for the year 1921), for having committed an offense arising out of the same acts upon which the Federal prosecutions were based. Irrespective of whether the prosecution be initiated by the Federal or the State sovereignty, the principle involved remains the same, and if counsel for plaintiffs in error require an authority entirely on all fours in this respect, we would respectfully call to mind the facts presented in the comparatively recent case of Ponzi *vs.* Fessenden *et al.*, 258 U. S., page 254 *et seq.* In the Ponzi case, plaintiff in error had been tried and convicted in the United States courts for the offense of using the mails for the purpose of defrauding. Ponzi was serving a sentence, pursuant to that conviction, in the United States penitentiary, and the State of Massachusetts took out a writ of *habeas corpus*, directed to the master

of the house of correction wherein Ponzi was incarcerated, directing the Federal agent having custody of Ponzi to bring him before the Superior Court of Massachusetts, to stand trial for a violation of the laws of that State. Chief Justice Taft, as organ of this Honorable Court, delivered the opinion in that case, which we here quote at large:

> "We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.
>
> "One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to convic-

tion of crime against it. *In re* Andrews, 236 Fed., 300; United States *v.* Marrin, 227 Fed., 314. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

"One accused of crime, of course, cannot be in two places at the same time. He is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense. Frank *v.* Mangum, 237 U. S., 300, 340; Lewis *v.* United States, 146 U. S., 370. If that is accorded him, he cannot complain. The fact that he may have committed two crimes gives him no immunity from prosecution of either.

"The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in Covell *v.* Heyman, 111 U. S., 176, as follows:

" 'The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity.

It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty.'

"The Heyman case concerned property, but the same principle applies to jurisdiction over persons as is shown by the great judgment of Chief Justice Taney in Ableman *v.* Booth, 21 How., 506, quoted from, and relied upon, in Covell *v.* Heyman.

"In the case at bar, the Federal District Court first took custody of Ponzi. He pleaded guilty, was sentenced to imprisonment and was detained under United States authority to suffer the punishment imposed. Until the end of his term and his discharge, no State court could assume control of his body without the consent of the United States. Under statutes permitting it, he might have been taken under the writ of *habeas corpus* to give evidence in a Federal court, or to be tried there if in the same district, Sec. 753, Rev. Stats., or be removed by order of a Federal court to be tried in another district, Sec. 1014, Rev. Stats., without violating the order of commitment made by the sentencing court. *Ex parte* Bollman, 4 Cranch, 75, 98; *Ex parte* Lamar, 274 Fed., 160, 164. This is

with the authority of the same sovereign which committed him.

"There is no express authority authorizing the transfer of a Federal prisoner to a State court for such purposes. Yet we have no doubt that it exists and is to be exercised with the consent of the Attorney General. In that officer, the power and discretion to practice the comity in such matters between the Federal and State courts is vested. The Attorney General is the head of the Department of Justice. Rev. Stats., Sec. 346. He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed. United States *v.* San Jacinto Tin Co., 125 U. S., 273. *In re* Neagle, 135 U. S., 1; Kern River Co. *v.* United States, 257 U. S., 147; Rev. Stats., Sec. 359; Act of June 30, 1906, c. 3935; 34 Stat., 816; Rev. Stats., Sections 360, 361, 357, 364. By Sec. 367, Rev. Stats., the Attorney General is authorized to send the Solicitor General or any officer of the Department of Justice, 'to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.'

"The prisons of the United States and the custody of prisoners under sentence are generally under the supervision and regulation of the Attorney General. Act March 3, 1891, c. 529, 26 Stat., 839. He is to approve the expenses of the transportation of United States prisoners by the marshals under his super-

vision to the wardens of the prisons where they are to be confined, 26 Stat., 839. He makes contracts with managers of State prisons for the custody of United States prisoners. Rev. Stats., Sec. 5548. He designates such prisons. Rev. Stats., Sec. 5546, amended 19 Stat., 88, and 31 Stat., 1450. Release of United States prisoners on parole whether confined in Federal prisons or in State prisons is not made save with the approval of the Attorney General. Act of June 25, 1910, c. 387, 36 Stat., 819. The Attorney General is authorized to change the place of imprisonment of United States prisoners confined in a State prison when he thinks it not sufficient to secure their custody, or on their application, because of unhealthy surroundings, or improper treatment. Rev. Stats., Sec. 5546, as amended 19 Stat., 88, and 31 Stat., 1450. One important duty the Attorney General has to perform is the examination of all applications for pardon or commutation, and a report and recommendation to the President.

"This recital of the duties of the Attorney General leaves no doubt that one of the interests of the United States which he has authority and discretion to attend to, through one of his subordinates, in a State court, under Sec. 367, Rev. Stats., is that which relates to the safety and custody of United States prisoners in confinement under sentence of Federal courts. In such matters he represents the United States and may on its part practice the comity which the harmonious and effective operation of both systems of courts requires, provided it does not prevent enforcement of the sentence of the Fed-

eral courts or endanger the prisoner. Logan *v.* United States, 144 U. S., 263.

"Counsel for appellant relies on Sec. 5539, Rev. Stats., which directs that when any criminal sentenced by a Federal court is imprisoned in the jail or penitentiary of any State or Territory 'such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory.' This section, it is said, prevents the Attorney General or any other Federal officer from ordering the superintendent of a State prison to produce a Federal prisoner for trial or testimony. But it is clear that the section has no such effect. The section is only one of many showing the spirit of comity between the State and national governments in reference to the enforcement of the laws of each. To save expense and travel, the Federal Government has found it convenient with the consent of the respective States to use State prisons in which to confine many of its prisoners, and the Attorney General is the agent of the Government to make the necessary contracts to carry this out. In order to render the duty thus assumed by the State governments as free from complication as possible, the actual authority over, and the discipline of, the Federal prisoners while in the State prison are put in the State prison authorities. If the treatment or discipline is not satisfactory, the At-

torney General can transfer them to another prison, but while they are there, they must be as amenable to the rules of the prison as are the State prisoners. But this does not have application to the procedure or the authority by which their custody may be permanently ended or temporarily suspended.

"The authorities, except when special statutes make an exception, are all agreed that the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. One of the best-considered judgments on the subject is Rigor *v.* State, 101 Md., 465. The Supreme Court of Maryland said (p. 471):

" 'The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt.'

"Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offense is to postpone trial on many others, it furnishes the criminal an opportunity to avoid the full expiation of his crimes. These considerations have led most courts to take the same view as that expressed in the case just cited. Other cases are State *v.* Wilson, 38 Conn., 126; Thomas *v.* People, 67 N. Y., 218, 225; Peri *v.* People, 65 Ill., 17; Commonwealth *v.* Ramunno, 219 Pa. St., 204; Kennedy *v.* Howard, 74 Ind., 87; Singleton *v.* State, 71 Miss., 782; Huffaker

v. Commonwealth, 124 Ky., 115; Clifford *v.* Dryden, 31 Wash., 545; People *v.* Flynn, 7 Utah, 378; *Ex parte* Ryan, 10 Nev., 261; State *v.* Keefe, 17 Wyo., 227, 252; *Re* Wetton, 1 Crompt. & J., 459; Regina *v.* Day, 3 F. & F., 526.

"It is objected that many of these cases relate to crimes committed in prison during service of a sentence. The Maryland case did not, nor did some of the others. But the difference suggested is not one in principle. If incarceration is a reason for not trying a prisoner, it applies whenever and wherever the crime is committed. The unsoundness of the view is merely more apparent when a prisoner murders his warden than when he is brought before the court for a crime committed before his imprisonment. It is the *reductio ad absurdum* of the plea.

"Nor, if that be here important, is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. Kite *v.* Commonwealth, 11 Metc., 581, 585, an opinion by Chief Justice Shaw; *Ex parte* Ryan, 10 Nev., 261, 264; Thomas *v.* People, 67 N. Y., 218, 226.

"But it is argued that when the prisoner is produced in the Superior Court, he is still in the custody and jurisdiction of the United States, and that the State court cannot try one not within its jurisdiction. This is a refinement which if entertained would merely obstruct justice. The prisoner when produced in the Superior Court in compliance with its writ is personally present. He has full opportunity to make his defense exactly as if he were brought before the court by its own officer. State *v.*

> Wilson, 38 Conn., 126, 136. The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer. This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty.
>
> "The question must be answered in the affirmative."

The power of the States over intoxicating liquors does not now flow from the Eighteenth Amendment, as full regulation of the manufacture and use of intoxicating liquors was the prerogative of the States under their reserved police powers, and this power has been parted with only to the extent indicated by the Eighteenth Amendment, and State laws tending toward the enforcement of the Eighteenth Amendment still rest on the authority of the State just as they did before the amendment. This being so, the State laws and the Federal laws as to intoxicating liquors emanate from different sovereignties. They denounce different offenses; the one offense against the State, the other against the United States. It is clear that the same act may be an offense against the laws of two governments, may be punished by both, and that a plea of former jeopardy in a tribunal of one government is not available in a tribunal of the other. The same act may constitute an offense equally against the United States and the State, and therefore a conviction in the Federal court for possession and transportation of

intoxicating liquors under the Federal law is no defense to a prosecution for the same act under the State law. State *v.* Rhodes (Tenn.), 242 S. W., 642; 22 A. L. R., 1544.

In U. S. *vs.* Holt, 270 Fed., 639, the court said:

> "It was not necessary for the Supreme Court in the liquor cases to exactly define the 'concurrent power' of the Eighteenth Amendment. Nor is it in this case. It is sufficient and obvious, in view of the conclusions reached by the court, that any interpretation is excluded which would deny to either the Nation or the State the power to punish such acts as are charged against defendant here. As applied in this case, the words in the second section of the amendment are not to be extended beyond the effect given to such provisions as the one quoted above, which are to be found in several of the acts of Congress. 'Nothing in the act contained shall be held to take away or impair the jurisdiction of the several States under the laws thereof.' When the 'concurrent power' is thus restricted to its real purposes and significance, it follows that the conviction of the defendant in the State court cannot prevent his prosecution in this court; this upon principles long settled and established, and authoritative precedents long acquiesced in. The last expression of the Supreme Court is found in Gilbert *v.* Minnesota, 254 U. S., 325; 41 S. Ct., 125; 65 U. S., L. Ed., —, decided December 13, 1920: 'The same act * * * may be an offense or transgression of both (the duty of a citizen to the State and the Nation) and both may punish it without a conflict of their sovereignties.' Nu-

merous cases are cited, beginning with Morse *v.* Illinois, 14 How., 13; 14 U. S., L. Ed., 306, and terminating with Halter *v.* Nebraska, 205 U. S., 34; 27 S. Ct., 419; 51 U. S., L. Ed., 696; 10 Ann. Cas., 525. A study of the cases can leave no doubt of the soundness and wisdom of the settled law that, where both sovereignties may punish, a conviction by one is not a bar to punishment by the other.

"Still the matter of the sentence imposed by the State court should be considered and if the defendant will plead guilty a nominal sentence will be imposed. United States *v.* Holt, 270 Fed., 639."

It might be noticed in passing that if the sovereignty of the Federal Government was outraged by the plaintiffs in error being prosecuted in the State courts, while they were awaiting trial in the Federal courts, these plaintiffs in error had no personal right to urge this as a plea in bar, and the sole right to object to the prosecution in the State courts was vested in the Federal Government, represented by the Attorney General of the United States, and his duly authorized assistants.

Reply of the State of Louisiana, Defendant in Error, to the Second and Third Points Relied upon by Plaintiffs in Error.

The second and third points relied upon by plaintiffs in error may be discussed together, because of the fact that they both are determinable by the same prin-

ciple of law. In the cases at bar, the Supreme Court of Louisiana has construed Act 39 of the Legislature of the State of Louisiana for the year 1921 with reference to the State Constitution and the Revised Statutes (980) of the State of Louisiana. That court's finding that Act 39 of the Legislature of Louisiana for the year 1921 and Revised Statutes of Louisiana (Section 980) are to be taken together and applied conjunctively is a conclusive judgment and, we respectfully submit, not a matter properly within the final appellate jurisdiction of this Honorable Supreme Court.

In support of our position above, we cite the following cases, holding that where no Federal question is involved the Supreme Court of the United States cannot review a decision of a State court with respect to a question arising under the Constitution of the State. Green *vs.* Frazier, 253 U. S., 233; 64 L. Ed., 878; Fort Smith Lumber Co. *vs.* Ark., 251 U. S., 532; 64 L. Ed., 376; Crane *vs.* Campbell, 245 U. S., 304; 60 L. Ed., 304; Ohio *vs.* Hildebrant, 241 U. S., 565; 60 L. Ed., 1172; John *vs.* Paullin, 231 U. S., 583; 58 L. Ed., 381; West *vs.* La., 194 U. S., 258; 48 L. Ed., 965; Murray *vs.* La., 163 U. S., 101.

This Honorable Court has further held in the following cited decisions that a decision of a State Supreme Court, construing the statutes of the State, is not subject to review by the Supreme Court of the United States. American Mfg. Co. *vs.* St. Louis, 250 U. S., 459; 63 L. Ed., 266; Danziger *vs.* Cooley, 248 U. S., 319; 63 L. Ed., 266; Wells *vs.* State, 248 U. S., 165; 63 L.

Ed., 190; Rogers *vs.* Hennican Co., 240 U. S., 184; 60 L. Ed., 594; King *vs.* W. Va., 216 U. S., 92; 54 L. Ed., 396; O'Connor *vs.* Texas, 202 U. S., 501; 50 L. Ed., 1120; Price *vs.* Pa. R. R., 113 U. S., 218; — L. Ed., 980; West *vs.* La., 194 U. S., 258; 48 L. Ed., 965.

We therefore earnestly feel that there is but one possible Federal question suggested by the assignments of error taken in this case, and that is the question discussed under part 1, whether Section 256 of the Federal Judicial Code operates to deprive the States of their inherent right to prosecute violations of their laws. We feel that this is well-trodden ground, having been particularly well settled in the recent expression of this Court contained in the Lanza case, and we therefore respectfully pray that the judgment and sentence of the courts *a qua* be affirmed and this appeal be dismissed at plaintiffs' cost.

Respectfully submitted,

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Certificate of Service.

The undersigned counsel for defendant in error hereby certify that they have served a copy of the within brief upon T. Arthur Edwards, counsel for plaintiffs in error, by depositing the said brief in the United States mail, postage fully paid, this 24th day of September, 1926.

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